

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JANE WALDROP, et al.,

Plaintiff(s),

v.

GREEN TREE SERVICING, LLC,

Defendant(s).

Case No. 2:14-CV-2091 JCM (GWF)

ORDER

Presently before the court is defendant Green Tree Servicing LLC's motion to dismiss. (Doc. # 7). Plaintiffs Jane Waldrop and William Waldrop filed an opposition (doc. # 12) and defendant filed a reply. (Doc. # 13).

I. Background

This case stems from several mortgage loans related to the plaintiffs' residential property located at 3415 Glendale Circle in North Las Vegas. Bank of America, N.A. serviced the initial loan on the subject property. On April 1, 2013, Bank of America, N.A. allegedly transferred servicing rights to defendant Green Tree Servicing LLC. Plaintiffs then refinanced the loan and executed a new promissory note and deed of trust in favor of WJ Bradley, which was allegedly recorded against the property on April 10, 2013. Plaintiffs understood the refinance satisfied and closed the initial loan. The substitution and reconveyance for the initial loan were allegedly recorded on May 15, 2013.

On July 15, 2013, plaintiffs received a letter from defendant stating the payoff for the previous loan was insufficient and that an outstanding balance of \$4,446.93 remained. Defendant allegedly called and sent letters to plaintiffs with payment demands from about August of 2013 until February 8, 2014.

1 During this period, plaintiffs allege they sent a qualified written request (“QWR”) to
 2 defendant on or about the last week of September 2013 or the first week of October 2013 and
 3 received correspondence dated October 30, 2013, in response. The October 30, 2013,
 4 correspondence stated that plaintiffs’ final payment for February 2013 was returned due to
 5 insufficient funds. As such, when defendant received the purported loan payoff amount, plaintiffs
 6 still owed the February 2013 payment of \$1,218.77. The correspondence stated this amount was
 7 required to satisfy and close the initial loan. Plaintiffs assert that they attempted to remit such
 8 payment to payoff and close their initial loan, but the payment was returned to plaintiffs.

9 Plaintiffs sent a second QWR to defendant which defendant allegedly received on
 10 December 2, 2013. Defendant acknowledged receipt of the QWR in correspondence dated
 11 December 12, 2013, which contained the same language as their October 30, 2013, response.
 12 Plaintiffs assert defendant’s response failed to provide a “ledger or means of substantiating the
 13 alleged debt.” Plaintiffs allegedly did not receive a billing statement from defendant until February
 14 8, 2014, which stated payment of \$12,591.86 was due, the account was severely delinquent, and
 15 immediate action was required.

16 Finally, on February 27, 2014, plaintiffs received a letter from defendant confirming that
 17 the previous loan had been paid in full.

18 Plaintiffs initiated the instant action on December 10, 2014. The complaint asserts
 19 numerous claims and requests damages from defendant. (Doc. #1). Defendant moves to dismiss
 20 plaintiffs’ complaint for failure to state a claim upon which relief can be granted. (Doc. # 7).

21 **II. Legal Standard**

22 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 23 can be granted.” Fed.R.Civ.P. 12(b)(6). A properly pled complaint must provide “[a] short and
 24 plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2);
 25 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While rule 8 does not require detailed
 26 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
 27 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

1 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 2 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter
 3 to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation omitted).

4 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 5 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 6 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
 7 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
 8 statements, do not suffice. *Id.*

9 Second, the court must consider whether the factual allegations in the complaint allege a
 10 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
 11 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
 12 alleged misconduct. *Id.* at 678.

13 Where the complaint does not permit the court to infer more than the mere possibility of
 14 misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to
 15 relief.” *Id.* at 679 (internal quotations omitted). When the allegations in a complaint have not
 16 crossed the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550
 17 U.S. at 570.

18 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 19 1216 (9th Cir. 2011). The *Starr* court stated,

20 “First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim
 21 may not simply recite the elements of a cause of action, but must contain sufficient
 22 allegations of underlying facts to give fair notice and to enable the opposing party to defend
 23 itself effectively. Second, the factual allegations that are taken as true must plausibly
 suggest an entitlement to relief, such that it is not unfair to require the opposing party to be
 subjected to the expense of discovery and continued litigation.”

24 *Id.*

25 **III. Discussion**

26 Plaintiffs’ complaint asserts five causes of action: (1) violation of the Real Estate
 27 Settlement Practices Act (“RESPA”), 12 U.S.C. § 2605 *et seq.*; (2) violation of the Fair Credit
 28 Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.*; (3) violation of the Fair Debt Collection
 Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*; (4) violation of Nevada Deceptive Trade

1 Practices Act (“NDTPA”) pursuant to NRS §§ 41.600, 598.091 *et seq.*; and (5) negligence. (Doc.
2 # 1).

3 Defendant moves to dismiss plaintiffs’ complaint in its entirety. The merits of each claim
4 will be addressed in turn.

5 **A. Real Estate Settlement Practices Act**

6 Defendant first asks the court to dismiss plaintiffs’ claims alleging defendant violated
7 RESPA by not timely responding to their qualified written request (“QWR”). (Doc. #1). In part,
8 RESPA provides that a loan servicer shall respond to any QWR from a borrower within five (5)
9 days of receipt. 12 U.S.C. § 2605(e)(1)(A).¹ Here, plaintiffs assert specific dates which support
10 defendant’s alleged QWRs were not timely acknowledged and/or responded to by defendant.

11 To recover under RESPA, a plaintiff must allege sufficient factual matter suggesting that
12 the plaintiff suffered actual damages. 12 U.S.C. § 2605(f)(1)(A); *Hamilton v. Bank of Blue Valley*,
13 746 F. Supp. 2d 1160, 1175 (E.D. Cal. 2010); *Sitanggang v. Countrywide Home Loans, Inc.*, 419
14 Fed. Appx. 756, at 757 (9th Cir. 2011). Under RESPA, a borrower may not recover actual damages
15 for nonpecuniary losses. *See Lal v. American Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223
16 (E.D. Cal. 2010) (dismissing RESPA claim because Plaintiff failed to plead pecuniary loss as a
17 result of the alleged RESPA violation).

18 Plaintiffs allege defendant’s QWR responses were made in “attempt to frighten plaintiffs
19 and persuade them to make a payment.” (Doc. #1 at 7). As a result, plaintiffs assert they “suffered
20 severe emotional and physical distress . . .” *Id.* Defendant argues plaintiffs’ complaint fails to
21 allege defendant’s conduct caused the alleged harm. However, plaintiffs’ fail to allege facts
22 regarding any **actual damages** sustained as a result of the alleged violation.

23 Therefore, plaintiffs have failed to plead sufficient factual matter to demonstrate that they
24 suffered actual damages. Accordingly, defendant’s motion to dismiss plaintiffs’ RESPA claim is
25 granted.

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28 ¹ The previous version of the statute allowed the loan servicer 20 days to respond. The time
limit for response was changed to 5 days, effective January 21, 2013. All correspondence
mentioned herein occurred after such effective date.

1 **B. Fair Credit Reporting Act**

2 Defendant argues that dismissal of plaintiffs' FCRA claim is appropriate because the
3 FCRA does not apply to a "furnisher" of information, but instead only to credit reporting
4 agencies ("CRAs"). However, the portion of the FCRA cited in plaintiffs' complaint applies
5 specifically to furnishers of information and imposes a duty upon them to provide accurate
6 information to credit reporting agencies. 15 U.S.C. § 1681s-2(a). "As it relates to furnishers of
7 information to consumer reporting agencies, the FCRA sets forth two general requirements: the
8 duty to provide accurate information, 15 U.S.C. § 1681s-2(a), and the duty to investigate the
9 accuracy of reported information upon receiving notice of a dispute, § 1681s-2(b)." *Cisneros v.*
10 *Trans Union, LLC*, 293 F.Supp.2d 1167, 1174 (D. Ha. 2003).

11 To state a claim under 15 U.S.C. § 1681s-2(b), plaintiff must allege: (1) plaintiff
12 identified an inaccuracy in his/her credit report; (2) plaintiff notified a credit reporting agency;
13 (3) the credit reporting agency notified the furnisher of the information; and, (4) the furnisher
14 failed to investigate the inaccuracies or further failed to comply with the requirements in 15
15 U.S.C. § 1681s-2(b)(1)(A)-(E). The "pertinent question" in analyzing the adequacy of the
16 furnisher's investigation, is "whether the furnisher's procedures were reasonable in light of what
17 it learned about the nature of the dispute from the description in the CRA's notice of dispute."
18 *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1157 (9th Cir. 2009).

19 Here, defendant argues plaintiffs do not allege the date on which they reported the credit
20 dispute to any consumer reporting agency or what defendant wrongfully reported. (Doc. 7 at 6).
21 However, an FCRA claim does not need to be pled with specificity. The exact date need not be
22 included. Plaintiffs do allege they communicated their dispute to Equifax, Experian and
23 TransUnion. (Doc. #1 at 11). Plaintiffs believe these credit reporting agencies subsequently
24 notified defendant of the dispute. *Id.* Plaintiffs not only allege "defendant failed to review all
25 relevant information provided by the credit report agencies and/or conduct a reasonable
26 investigation," but also that "defendant notified the credit reporting agencies the derogatory credit
27 information reported was correct and failed to notify the credit reporting agencies that the account
28 was disputed." *Id.*

1 The court finds the defendant is a furnisher of information and is subject to the duties set
 2 forth in 15 U.S.C. §1681s-2 *et al.* Plaintiffs' complaint sufficiently alleges defendant furnished
 3 plaintiffs' information to one or more consumer reporting agencies and failed to comply with the
 4 requirements of the FCRA. Accordingly, defendant's motion to dismiss plaintiffs' FCRA claim is
 5 denied.

6 **C. Fair Debt Collections Practices Act**

7 Plaintiffs assert that defendant violated the Fair Debt Collection Practices Act. Defendant
 8 argues that it is not a "debt collector" as defined by the FDCPA.

9 The FDCPA provides that a debt collector is "any person who uses any instrumentality of
 10 interstate commerce in any business, the principal purpose of which is the collection of any debts,
 11 or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted
 12 to be *owed or due another.*" 15 U.S.C. §1692(a)(6).

13 Plaintiffs assert that defendant acted "as a third party debt collector for the owner of
 14 plaintiff's [sic] mortgage loan." (Doc. 1 at 2) Taking the allegations on the face on plaintiffs'
 15 complaint as true, the court draws a reasonable inference that defendant falls within the FDCPA's
 16 definition of a debt collector because, according to plaintiff, defendant is a "third party" servicer
 17 to the "owner" of the mortgage. (*Id.*). If defendant is a third party servicer to some other owner,
 18 then it "collects or attempts to collect . . . debts . . . asserted to be owed or due another." 15 U.S.C.
 19 §1692(a)(6).

20 In pertinent part, the FDCPA provides a debt collector may not engage in any conduct to
 21 harass, oppress, or abuse any person in connection with the collection of a debt. 15 U.S.C. § 1692d.
 22 Plaintiffs allege they received harassing, inaccurate, and inconsistent communications from
 23 defendant (Doc. 1 at 6), and that defendant tried to "frighten plaintiffs and persuade them to make
 24 a payment..." (Doc. 1 at 7). Taking plaintiffs' factual allegations as true, defendant violated the
 25 FDCPA by engaging in the above-mentioned conduct. Thus, the motion to dismiss is denied as to
 26 plaintiffs' FDCPA claim.

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1 **D. Nevada Deceptive Trade Practices Act**

2 Defendant seeks to dismiss plaintiffs' Nevada Deceptive Trade Practices Act ("NDTPA")
3 claim. An NDTPA claim must be pled with particularity under FRCP Rule 9(b).

4 Plaintiffs assert a cause of action for deceptive trade practices pursuant to Nevada Revised
5 Statute chapter 598, *et seq.*. Plaintiffs contend that defendant violated this section by knowingly
6 making false representations in a transaction. Defendant moves to dismiss this claim on the
7 grounds that plaintiffs fail to plead with particularity as required by Rule 9(b). (Doc. # 7). It is
8 true that when a claim relies upon allegations of fraud, it must meet the enhanced pleading
9 standards of rule 9(b). *See, e.g., Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

10 The court does not reach this question, however, because it has previously dismissed
11 comparable claims because the Deceptive Trade Practices Act does not cover real estate
12 transactions. *See Fung Ying Leung v. Mortg. Elec. Registration Sys., Inc.*, no. 2:12-cv-1393-JCM-
13 VCF, 2013 WL 237225, at *3 (D. Nev. Jan. 22, 2013). Plaintiffs allege that defendant acted
14 fraudulently with regard to plaintiffs' mortgage. Because conduct related to real estate transactions
15 is not covered by NRS 598, this claim will be dismissed.

16 **E. Negligence**

17 To prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence
18 of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages. *Klasch v. Walgreen*
19 *Co.*, 264 P.3d 1155, 1158 (Nev. 2011) (citing *Sanchez v. Wal-Mart Stores*, 221 P.3d 1276, 1280
20 (Nev. 2009)).

21 Plaintiffs' complaint alleges that defendant breached its duty to properly and accurately
22 service plaintiffs' loan. Defendant argues no duty of care exists in this transaction. The parties do
23 not dispute that under Nevada law, a lender generally owes no duty of care to a borrower when the
24 lender's involvement in the loan transaction falls within the scope of its conventional role as a
25 mere lender of money. *Weingartner v. Chase Home Fin., LLC*, 702 F. Supp. 2d 1276, 1290 (D.
26 Nev. 2010). Plaintiffs' complaint asserts defendant was "the servicer of Plaintiff's [sic] mortgage
27 loan." (Doc #1 at 2). The court finds that defendant, as the lender's servicer and agent, acted within
28 the conventional role of a lender when attempting to collect the money allegedly owed.

1 Accordingly, plaintiffs' claim for negligence will be dismissed with prejudice.

2 **IV. Conclusion**

3 Based on the above analysis, the court will dismiss plaintiffs' negligence, RESPA, and
4 NDTPA claims. Plaintiffs' FRCA claim and FDCPA claim will survive.

5 Accordingly,

6 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to
7 dismiss be, and the same hereby is, GRANTED with respect to plaintiffs' negligence, RESPA, and
8 NDTPA claims and DENIED with respect to plaintiffs' FRCA and FDCPA claims.

9 DATED October 5, 2015.

10 
11 UNITED STATES DISTRICT JUDGE